Decision _____

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| Order Instituting Investigation on the Commission's Own Motion into the fatal accident at the San Francisco Municipal Transportation Agency's Mission Rock Station in the City and County of San Francisco, on December 1, 2012. | Investigation 13-09-012 (Filed September 19, 2013) |

# MODIFIED PRESIDING OFFICER'S DECISION FINDING THE SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY IN CONTEMPT, IN VIOLATION OF RULE 1.1 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE

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# MODIFIED PRESIDING OFFICER'S DECISION FINDING THE SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY IN CONTEMPT, IN VIOLATION OF RULE 1.1 OF THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE

## Summary

This decision finds that the San Francisco Municipal Transportation Agency (SFMTA) is in contempt of the March 14, 2013 subpoena *duces tecum* from the Commission's Safety and Enforcement Division, Rail Transit Safety Section, when it failed to produce, by the response date demanded, the training records and accident records for the SFMTA driver involved in the fatal accident that occurred at the Mission Rock Station in the City and County of San Francisco on December 1, 2012. The SFMTA is ordered to pay a fine of $1,000.00. In addition, this decision finds that the SFMTA should be fined in the amount of $210,500.00 for violating Rule 1.1 of the Commission's Rules of Practice and Procedure.

This proceeding is closed.

## 1. Background

### 1.1. The Order Instituting Investigation

On September 25, 2013, the Commission instituted an Order Instituting Investigation (OII) against the San Francisco Municipal Transportation Agency (SFMTA). The issue is whether the SFMTA, after being served on March 14, 2013, with a subpoena *duces tecum* from the Commission's Safety and Enforcement Division (SED), Rail Transit Safety Section (RTSS), violated California and federal law when it failed to produce, by the April 9, 2013 deadline, the full and unredacted records regarding the transit driver who operated a Muni Light Rail Train on December 1, 2012 that allegedly struck and killed a pedestrian at or near the Mission Rock station on Third Street in San Francisco, California. The specific documents requested were: 1) training records; 2) accident records;

3) drug testing records; and 4) the five previous years of efficiency testing records and compliance test records. The subpoena *duces tecum* states in bold and in all capitalization: DISOBEDIENCE OF THIS SUBPOENA MAY BE PUNISHED AS CONTEMPT BY THIS COMMISSION. (OII, Attachment 5.)

In response, the SFMTA asserted it only had training and accident records. Thus, this decision is limited to the legal claims surrounding the SFMTA's refusal to produce unredacted copies of the transit driver's training and accident records.

### 1.2. The Prehearing Conference (PHC)

The PHC was held on December 18, 2013. Patrick Berdge (Berdge) appeared on behalf of SED. Julia Friedlander (Friedlander) and Stephanie Stuart (Stuart) appeared on behalf of the SFMTA.

### 1.3. The Issues in the Scoping Memo and Ruling

The Scoping Memo and Ruling (Scoping Ruling) was issued on January 30, 2014, and identified the following five issues for resolution:

1. Do the principles of either waiver and/or estoppel apply to prevent the SFMTA from objecting to the subpoena *duces tecum*?
2. Does the RTSS' safety jurisdiction to investigate Rail Fixed Guideway Systems and Light Rail Transit incidents permit it to obtain full and unredacted copies of the SFMTA's training, accident, drug and alcohol testing, and efficiency and/or rules-compliance documents of the transit driver of the Muni Light Rail Train involved in the December 1, 2012 incident?
3. Do the privacy concerns of the SFMTA's transit driver outweigh RTSS' right to obtain the unredacted documents identified, *supra*?
4. Is the SFMTA in contempt of RTSS' March 14, 2013 subpoena *duces tecum* that was served on Edward D.

Reiskin, the SFMTA's Director, for failure to provide the documents that were the subject of the subpoena *duces tecum*?

5. If the SFMTA is in contempt of the Commission, should the SFMTA be fined or otherwise penalized?

The Scoping Ruling found that the first three issues (*i.e.* waiver and estoppel, the extent of RTSS' safety jurisdiction, and the transit driver's claimed right of privacy) were legal issues that could be resolved by briefing rather than by evidentiary hearings.

Robert M. Mason III was designated as the assigned Administrative Law Judge (ALJ) and Presiding Officer.

### 1.4. The ALJ's Ruling on Legal Issues One, Two and Three

After allowing the parties to brief the issues, on May 6, 2014, the assigned ALJ made the following rulings on legal issues one, two, and, three:

Legal issue one: The SFMTA did not waive or forfeit its right to object to the Commission's SED, RTSS, subpoena *duces tecum* that sought the production of unredacted copies of, inter alia, the transit driver's training and accident records.

Legal issue two: The Commission's safety jurisdiction to investigate Rail Fixed Guideway Systems and Light Rail Transit accidents permits it to obtain and SFMTA must produce rather than make available for inspection unredacted copies of, inter alia, the transit driver's training and accident records.

Legal issue three: The SFMTA has failed to establish any privacy concerns with its transit driver's training and accident records that would excuse it, either in whole or in part, from producing rather than making available for inspection unredacted copies of the transit driver's training and accident records in response to the Commission's subpoena *duces tecum*.

### 1.5. SFMTA's Production of the Training Records and Accident Records

On June 4, 2014, the SFMTA produced the unredacted copies of the training and accident records at issue in this proceeding after the May 6, 2014 ruling.

### 1.6. The Evidentiary Hearing on Issues Four and Five and the Exhibits Admitted into Evidence

The evidentiary hearing on issues four and five was held on June 26, 2014. SED did not call any witnesses and instead relied on the Commission's OII, along with the documents attached thereto, as the evidence for its case in chief. Official Notice is taken of the Commission's OII and supporting documents pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure and Evidence Code § 452.

The SFMTA called one witness, Friedlander, its General Counsel, who was cross examined by counsel for SED. Friedlander's testimony and supporting evidence were marked and admitted into evidence as follows:

- Exhibit A: Direct Testimony of Friedlander, with the following attachments:
- Attachment 1: Letter from Melvyn Henry, SFMTA, dated February 15, 2013 to Steve Espinal, Rail Transit Safety and Security.
- Attachment 2: E-mail stream between Melvyn Henry, Jimmy Xia, Jason Heller, et al, dated February 25, 2013, February 22, 2013, and February 21, 2013.
- Attachment 3: Letter from Berdge, California Public Utilities Commission (CPUC or Commission) Staff Counsel, to Melvyn Henry dated February 27, 2013.
- Attachment 4: E-mail stream between Berdge and Friedlander, dated March 5, 2013 and March 4, 2013.

- Attachment 5: Subpoena *duces tecum* dated March 14, 2013 and directed to Edward D. Reiskin, Director of Transportation, SFMTA.
- Attachment 6: Letter from Friedlander to Berdge, dated April 19, 2013.
- Attachment 7: Letter from Friedlander to Frank Lindh, General Counsel, CPUC, dated May 10, 2013.
- Attachment 8: Letter from Frank Lindh to Friedlander, dated May 22, 2013.
- Attachment 9: Letter from Julia Friedlander to Frank Lindh, dated June 28, 2013.
- Attachment 10: Letter from Stuart, Deputy City Attorney, to Cesar Cabatbat.
- Attachment 11: Letter from Stuart to Berdge, dated June 4, 2014.

### 1.7. Closing Briefs

The SFMTA and SED filed their post-hearing briefs on legal issues four and five on July 17, 2014. SFMTA and SED filed their reply briefs on July 24, 2014.

### 1.8. SED's Motion to Reopen the Record

On August 11, 2014, SED filed a motion to reopen the record to permit the introduction of drug and alcohol records of the train operator involved in the December 1, 2012, accident, which is the subject of the instant proceeding. SED claims that it first received the additional documents on July 17, 2014, when they were transmitted via e-mail from the SFMTA. SED argued that not only do these documents establish that SFMTA had these records in its possession and failed to produce them within the time provided in the Commission's subpoena *duces tecum*, but that this tardy response is another instance of SFMTA conduct that warrants a finding of contempt.

On August 20, 2014, the assigned ALJ issued an e-mail ruling granting SED's motion to reopen the record to admit Exhibit B into evidence and permitted the parties to file opening briefs no later than September 2, 2014, and reply briefs no later than September 9, 2014.

The SFMTA filed its opening brief on September 2, 2014, asserting that it was not in contempt because (1) it reasonably believed in good faith that the issue of providing these records was closed; (2) SED delayed in requesting the records in the subpoena *duces tecum* after SFMTA advised SED that there were no post-accident drug/alcohol records; and (3) civil contempt for failing to provide the records was moot because SFMTA finally did provide the records.

SED filed its reply brief on September 9, 2014, claiming that (1) the assertion of good faith is irrelevant because a claim of good faith under a mistake of law cannot excuse disobedience of a court order; (2) SED did not delay in requesting the operator's drug/alcohol test records as the record demonstrates numerous efforts to resolve this dispute without further litigation yet SFMTA continued to reject producing the subpoenaed records; and (3) SFMTA's subsequent production of documents does not excuse the earlier failure to comply with the subpoena *duces tecum*, and that a finding of contempt may still be made.

The following exhibits were admitted into evidence after SED's motion to reopen the record was granted:

- Exhibit A: SFMTA Transmittal e-mail to Berdge, dated July 17, 2013.
- Exhibit B: Operator's drug test history report [Confidential]

### 1.9. Extension of the Statutory Deadline

On March 12, 2015, the Commission issued an order extending the statutory deadline in this proceeding to September 14, 2015.

### 1.10. Submission

As we will explain, *infra*, this proceeding was submitted as of March 30, 2015.

## 2. Discussion

### 2.1. Contempt and the Appropriate Burden of Proof

Pursuant to Public Utilities Code Section (Pub. Util. Code §) 2113:

> Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record. The remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto.

Pub. Util. Code § 2113 does not set forth the precise criteria for a contempt finding and, not surprisingly, SED and the SFMTA have advocated contrary positions to guide the Commission in determining if the SFMTA should be held in contempt.

Citing a series of non-Commission decisions, the SFMTA asserts that SED must establish:

- Beyond a reasonable doubt;[1]

[1] The SFMTA's Post-Hearing Brief, at 8-9, citing *Hustedt v. Workers' Compensation Appeals Board* (1981) 30 Cal.3d 329, 347, fn. 15; *McCann v. Municipal Court* (1990) 221 Cal.App.3d 527, 537; *Conn, supra,* 196 Cal.App.3d, at 784; *In re Witherspoon* (1984) 162 Cal.App.3d 1000,1001-1002; *In re Martin* (1977) 71 Cal.App.3d 472, 480.

- That the SFMTA willfully disobeyed a lawful order;[2] and
- SED must overcome the presumption of innocence.[3]

In contrast, SED asserts that pursuant to Code of Civil Procedure § 2023.010(e), a finding of contempt may be found if the refusal to comply with a subpoena *duces tecum* is made without substantial justification, and it is the party subject to contempt who bears the burden of convincing the court that it acted with substantial justification.[4] Further complicating this inquiry is the fact that there are other appellate decisions that set forth a standard that is different than the ones either party has advanced. For example, in *In Re Jones* (1975) 47 Cal.App.3d 879, 881, the Court stated that a valid judgment of contempt must meet strict requirements and must show facts that establish:

- The tribunal's jurisdiction;
- Respondent's knowledge of the order disobeyed;
- Respondent's ability to comply; and
- Respondent's willful disobedience of the order.

The Commission has articulated a standard for the finding of contempt that combines some of the elements advanced by both SED and the SFMTA. In *Re Facilities-based Cellular Carriers and Their Practices, Operations and Conduct in connection with Their Siting of Towers*, Decision (D.) 94-11-018, 57 CPUC2d 176,

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[2] *Id.*, at 8, citing *People v. Gonzalez* (1996) 12 Cal.4th 804, 816; *In re Jones* (1975) 47 Cal.App.3d 879, 881; *Chapman v. Superior Court* (1968) 261 Cal.App.2d 194, 201.

[3] *Id.*, at 8-9.

[4] SED's Opening Brief, at 3-4, citing to *California Shellfish Inc. v. United Shellfish Co*. (1997) 56 Cal.App.4th 16, 25. Code of Civil Procedure § 2023.010(e) provides "Misuses of the discovery process include, but are not limited to, the following…making, without substantial justification, an unmeritorious objection to discovery."

190, the Commission stated that a contempt proceeding "is quasi-criminal in nature, and therefore the procedural and evidentiary requirements are the most rigorous and exacting of all matters handled by the Commission." (Quoting from 6 CPUC2d 336, 339, and citing to 5 CPUC2d 648, 649, and *Ross v. Superior Court of Sacramento County* (1977) 19 Cal.3d 899, 913.) In view of this heightened evidentiary standard, this Commission has required that in order to find a respondent in contempt:

- The person's conduct must have been willful in the sense that the conduct was inexcusable; or
- That the person accused of the contempt had an indifferent disregard of the duty to comply; and
- Proof must be established beyond a reasonable doubt.[5]

A review of the record demonstrates that the factors for a finding of contempt against the SFMTA have been established beyond a reasonable doubt.

### 2.2. The Commission has Jurisdiction Over the SFMTA with Respect to the Investigation of Transportation Incidents and has the Power to Subpoena the SFMTA's Records

Although the above contempt criteria do not speak to setting forth the Commission's jurisdiction, it is important to emphasize that the Commission's jurisdiction in this area is clear for determining the SFMTA's willfulness. *In Re Safety Standards for Rail Fixed Guideway Systems*,[6] the Commission explained that on December 27, 1995, the Federal Transit Administration (FTA) "issued 49 C.F.R. Part 659, Rail Fixed Guideway Systems; State Safety Oversight; Final

[5] 57 CPUC2d, at 205, citing *Little v. Superior Court* (1968) 260 Cal.App.2d 311, 317; *In Re Burns* (1958) 161 Cal.App.2d 137, 141-142; 68 CPUC 245; 63 CPUC 76; 80 CPUC 318; and D.87-10-059.

[6] D.96-09-081, 68 CPUC2d 156.

Rule…which…requires each state to designate an agency to oversee the safety of rail transit systems." Governor Wilson, by letter dated October 13, 1992, designated the Commission as the oversight agency for California. In California, the Final Rule applies to the Bay Area Rapid Transit District, the Los Angeles County Metropolitan Transportation Authority, SFMTA, the San Diego Metropolitan Transit Development Board, the Sacramento Regional Transit District, and the Santa Clara County Transit District.[7] Pursuant to Pub. Util. Code § 99152 and 49 C.F.R. Part 659, *et seq*., the Commission has exclusive jurisdiction over rail transit safety in California, including safety oversight of Rail Fixed Guideway Systems[8] and Light Rail Transit.[9] In particular, pursuant to Pub. Util. Code §§ 28500, *et seq*. and 29047, the SFMTA is a municipal transportation agency that is subject to the Commission's oversight.[10]

Moreover, in accordance with the FTA's grant of authority, California enacted a number of statutes that empower the Commission's staff to regularly conduct safety inspections of the transportation agencies identified above. (Pub. Util. Code §§ 28500, *et seq*., and 29047.) In addition, Pub. Util. Code § 315 states:

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[7] *Id.*

[8] Pursuant to General Order (GO) 164-D, Rail Fixed Guideway Systems are defined as follows:

> … any light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, cable car, automatic people mover, or automated guideway transit system used for public transit and not regulated by the (Federal Railroad Administration) FRA nor not specifically exempted by statute from Commission oversight.

[9] Pursuant to GO 143-A, Light Rail Transit is defined as "a mode of urban transportation employing light-rail vehicles capable of operating on all the alignment classifications described in the GO.

[10] D.96-09-081, 68 CPUC2d 156.

> The Commission shall investigate the cause of all accidents occurring within the State upon the property of any public utility or directly or indirectly arising from or connected with its maintenance or operation, resulting in loss of life or injury to person or property and requiring, in the judgment of the Commission, investigation by it, and may make such order or recommendation with respect thereto as in its judgment seems just and reasonable.

As part of this grant of authority, RTSS regularly conducts safety inspections of the SFMTA.

Pub. Util. Code § 311(a) gives the Commission the authority to, among other things, issue subpoenas to compel the production of documents:

> The commission, each commissioner, the executive director, and the assistant executive directors may administer oaths, certify to all official acts, and issue subpoenas for the attendance of witnesses and the production of papers, waybills, books, accounts, documents, and testimony in any inquiry, investigation, hearing, or proceeding in any part of the state.

Clearly, the Commission has jurisdiction over the SFMTA as to the matters that form the basis of this OII.

### 2.3. The SFMTA's Conduct was Willful (*i.e.* Inexcusable)

#### 2.3.1. The SFMTA had Knowledge of the Subpoena *Duces Tecum* that it Disobeyed

On April 11, 2013, Berdge wrote a letter to Friedlander (via U.S. mail and e-mail) to confirm their conversation that Friedlander would accept service of process of the March 14, 2013 subpoena *duces tecum*. (OII, Attachment 6.) Friedlander's testimony confirms receipt of the April 11, 2013 letter. (Friedlander Testimony, page 3, 11.)

Friedlander's letter dated April 19, 2013, also acknowledges receipt of the subpoena *duces tecum* that had been issued by the Commission's Executive Director, Paul Clanon, to Edward Reiskin, the SFMTA's Director of Transportation. (Exhibit A 6.) Friedlander testified that she "redacted the requested compliance check records, training records and accident records only to obscure performance evaluation information they contained." (Friedlander Testimony, page 5, 15.) As an alternative, Friedlander testified that she offered to make the "unredacted documents available for inspection at SFMTA offices, and I offered to provide unredacted copies to CPUC under an appropriate protective order or other non-disclosure agreement." (*Id.*)

On April 30, 2013, Friedlander was copied on a letter from Berdge to Chief ALJ, Karen Clopton. The Re line of the letter is "Motion to Hold San Francisco Municipal Transportation Agency in Contempt for Failure to Comply with a Subpoena *duces tecum* issued March 14, 2013." (OII, Attachment 8.) The letter notes that the response deadline to the subpoena *duces tecum* was April 9, 2013, a date the SFMTA missed. Berdge goes on to assert that "Ms. Friedlander has explained to me that the SFMTA will only provide certain documents demanded if Commission staff agrees to enter into a non-disclosure agreement concerning the use and release of those documents."

On May 10, 2013, Friedlander responded to Berdge's letter of April 30, 2013. (Exhibit A, Attachment 7.) While the letter states that the SFMTA has provided "extensive documentation to CPUC staff regarding the collision," the SFMTA only produced redacted copies of the records that were the subject of the subpoena *duces tecum*. She states that the SFMTA had produced redacted copies of the requested personnel records that dealt with performance evaluation information on the grounds that the SFMTA believed that information was

protected from disclosure to the public by the employee's constitutional privacy rights.

On May 22, 2013, Frank Lindh, the Commission's General Counsel, wrote to Friedlander and the Re line was "Motion to Hold SFMTA in Contempt." (Exhibit A, Attachment 8.) Lindh offered that if "the SFMTA provides these records in compliance with the current SED subpoena, SED and the Legal Division will not post on its internet site or disclose in response to California Public Records Act (CPRA) requests, in the absence of a Commission order or the consent of SFMTA." (*Id.*)

On June 28, 2013, Friedlander responded to Lindh's May 22, 2013 letter. (Exhibit A, Attachment 9.) Friedlander renewed her suggestion that SED and the SFMTA discuss the terms of a non-disclosure agreement "that might better facilitate the flow of information in future CPUC investigations of SFMTA incidents." (*Id.*)

On July 18, 2013, Berdge wrote to Friedlander and requested that the SFMTA produce the train operator's compliance checks for the last three years; efficiency tests for the last three years; and all accident reports.
(OII, Attachment 12.)

In sum, what this correspondence testimony establishes is that the SFMTA received, and was fully aware of, the subpoena *duces tecum*.

#### 2.3.2. The SFMTA had the Ability to Comply with the Subpoena *Duces Tecum*

The evidence is also undisputed that the SFMTA had the documents that were responsive to the subpoena *duces tecum* in its possession but elected, out of its asserted claims of personnel confidentiality, to produce only redacted copies. As this decision will explain, *infra*, producing redacted copies of the requested

records was not an option contained on the subpoena *duces tecum*, nor permitted by Commission law, and it is therefore irrelevant what past practices the SFMTA claimed it engaged in with SED over other record requests.

Moreover, once the assigned ALJ issued his May 5, 2014 ruling on Legal Issues One, Two, and Three, the SFMTA produced the unredacted copies of the subject records on June 4, 2014. (Exhibit A, Attachment 11; Reporter's Transcript, at 19.) All along, the SFMTA had the ability to comply with the subpoena *duces tecum*.

#### 2.3.3. The SFMTA Disobeyed the Subpoena *Duces Tecum* by Asserting Arguments that were Legally Untenable

##### 2.3.3.1. The SFMTA did not have the Legal Option of only Making the Unredacted Records Available for Inspection

As part of its response to Legal Issues One, Two, and Three, the SFMTA relied on Pub. Util. Code § 309.7(b) for the proposition that the scope of the Commission's ability to investigate transit incidents is limited to inspecting records and not being able to utilize its subpoena power to compel the production of unredacted copies of relevant records.[11] This position, however, is clearly undercut by Pub. Util. Code § 309.7(b) which uses expansive, rather than restrictive, language in describing the scope of the Commission's investigative powers:

> (b) In performing its duties, the consumer protection and safety division shall exercise all powers of investigation granted to the commission, including rights to enter upon

[11] The SFMTA's Brief on Legal Issues One, Two, and Three, at 3.

> land or facilities, inspect books and records, and compel testimony. The commission shall employ sufficient federally certified inspectors to ensure at the time of inspection that railroad locomotives and equipment and facilities located in Class I Railroad yards in California are inspected not less frequently than every 180 days, and all main and branch line tracks are inspected not less frequently than every 12 months. In performing its duties, the safety division shall consult with representatives of railroad corporations, labor organizations representing railroad employees, and the FRA.

By use of the phrase "shall exercise all powers of investigation granted," the Legislature made it clear that Commission is not limited to simply inspecting the records of a transit agency subject to its investigative jurisdiction. Thus, the phrase "including… inspect books and records" cannot be seen as placing a limit on the scope of the Commission's authority. To adopt the SFMTA's argument would require both the Commission and a reviewing court to rewrite the language of Pub. Util. Code § 309.7(b), something that the courts are reluctant to do when interpreting a statute. (*See e.g., In re Hoddinott* (1996) 12 Cal.4th 992, 1002, quoting *Napa Valley Wine Train, Inc. v. Public Utilities Commission* (1990) 50 Cal.3d 370, 381 ["However, in construing the statutory provisions a court is not authorized to insert qualifying provisions not included and may not rewrite the statute to conform to an assumed intention which does not appear from its language."].)

Similarly, the SFMTA's previous argument that GO 164-D, § 8.3(b) only requires or gives the responding party the option to make documents available to Commission staff for review at a location determined by the SFMTA, even when the documents have been subpoenaed, is also erroneous. GO 164-D, § 8.3(b) states:

> Provide for Staff's participation to the fullest extent possible in accident investigations, and make all information related to the accident investigation, including data from event recorders, available to Staff for review.

There is nothing in GO 164-D to suggest that it is intended to restrict the Commission's ability to exercise its subpoena power provided by Pub. Util. Code § 311(a). In fact, the subpoena *duces tecum* required Edward D. Reiskin, the SFMTA's Director, to produce the requested records to Berdge, meaning that the SFMTA was without the discretion to alter and propose new terms contrary to those set forth in the subpoena *duces tecum*. This is true regardless of the claims in the declaration of Melvyn Henry, Jr., SFMTA's Chief Safety Officer, that he regularly interacts with RTSS and it has been "SFMTA's regular practice to make documents and records related to a collision investigation available to RTSS for review at SFMTA offices."[12] RTSS's right to issue a subpoena, and SFMTA's duty to comply with the subpoena, are not altered by claims of past custom and practice. Pub. Util. Code §§ 29047[13] and 99152[14] give the Commission authority over public transit guideways, and Pub. Util. Code § 315 gives the Commission the authority to require entities such as SFMTA to file accident reports.

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[12] SFMTA's Opening Brief, Exhibit A (Declaration of Melvyn Henry, Jr., 2).

[13] The district shall be subject to regulations of the Public Utilities Commission (Commission) relating to safety appliances and procedures, and the Commission shall inspect all work done pursuant to this part and may make such further additions or changes necessary for the purpose of safety to employees and the general public.

[14] Any public transit guideway planned, acquired, or constructed, on or after January 1, 1997, is subject to regulations of the Commission relating to safety appliances and procedures.

Moreover, SFMTA's restrictive construction of its statutory responsibilities would be inconsistent with GO 164-D, § 8.3(b)'s phrase "provide for Staff's participation to the fullest extent possible in accident investigations." Dictating terms on how RTSS may review the unredacted training and accident records, or producing redacted documents, is antithetical to the concept of participation to the fullest extent possible.

As such, the Commission's ability to subpoena unredacted copies of alleged personnel records is not circumscribed by either Pub. Util. Code § 309.7, GO 164-D, § 8.3(b), or any prior pattern of practice.

#### 2.3.3.2. The Claimed Privacy Concerns of the SFMTA's Transit Driver do not Outweigh RTSS' Right to Obtain the Unredacted Training and Accident Records

CPRA was modeled after the 1967 Federal Freedom of Information Act, and that California courts have followed federal law to construe the CPRA. (*Braun, supra*, 154 Cal.App.3d, at 342.) "Both the federal and California courts have construed the statutory exemptions narrowly in order to accomplish the general policy of disclosure." (*Id.*) Moreover, the fact that a public record may fall within an exemption does not automatically prevent its production. CPRA exemptions are permissive rather than mandatory; they allow nondisclosure but do not prohibit disclosure. (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 652; *Re San Diego Gas and Electric Company* (1993) D.93-05-020.)[15]

To assist the courts and administrative agencies in resolving the conflict between claims of privacy and the public policy favoring disclosure, the

[15] 49 CPUC2d 241, at 242.

California Supreme Court developed a three-part test: (1) is there a specific, legally protected privacy interest; (2) is there a reasonable expectation of privacy; and (3) would the disclosure constitute a serious violation of privacy. (*Hill v. NCAA* (1994) 7 Cal.4th 1, 35-40; *see* also *Teamsters Local 856 v. Priceless LLC* (2003) 112 Cal.App.4th 1500, 1511-1523; and D.05-04-030.)[16] This decision sets forth and adopts the assigned ALJ's analysis of these three issues.

#### 2.3.3.3. Are Training and Accident Records Part of a Transit Driver's Personnel file?

While Government Code § 6254 (c) references "personnel files," this term is undefined. The courts, however, have stepped in to fill this legislative void and clarified that to qualify as a personnel file, the document must consist of a government record "on an individual which can be identified as applying to that individual." (*Versaci*, *supra*, quoting *United States Department of State v. Washington Post Company* (1982) 456 U.S. 595, 602.) Based on the record and the arguments, it is possible that the training and accident records would qualify as personnel records as they concern the transit driver for a government entity.

#### 2.3.3.4. Employee Training and Accident Records do not Automatically Enjoy a Specific, Legally Protected Privacy Interest

The fact that a document may be contained in a personnel file does not automatically cloak it with the privacy interests contemplated by § 6254(c). In *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 291, the Court, citing to and quoting from *Braun v. City of Taft*

[16] *Order Modifying D.04-08-055 and Denying Rehearing of the Decision as Modified*, citing to *Hill* and *Teamsters*.

(1984) 154 Cal.App.3d 332, cautioned against employing such an all or nothing approach in determining privacy interests: [*Braun*] rejected the argument that, because the exemption referred to "files," the legislature intended to exempt the entire file, and that disclosure of some documents would not be required if other documents in the file were exempt. (*Braun*, *supra*, at 341.) In light of the Legislature's policy favoring disclosure of public records, the court concluded it was "unlikely that the Legislature intended an all or nothing approach." (*Ibid.*)

Instead, *Hill* explained that privacy interests fall into two classes: (1) informational privacy, which consists of the interest in precluding the dissemination or misuse of sensitive and confidential information that would bring unjustified embarrassment or indignity; and (2) autonomy privacy, which Hill explained as "interests in making intimate personal decisions or conducting personal activities without observation, intrusion, or interference." (7 Cal.4th, at 35.)

It is unclear how either training or accident reports fit within either the definition of "informational privacy" or "autonomy privacy." Indeed, as for accident reports, this Commission has stated that Pub. Util. Code § 315 "is mandatory in requiring public utilities to file such accident reports with the Commission[.]"[17] The records sought concern a public accident and the training transit driver's receive in order to operate public modes of transportation in a safe manner. This is information that the public would expect to see as part of California's public policy of promoting transportation safety. Thus, neither class of documents carries a legally protected privacy interest.

[17] 49 CPUC2d, at 242.

#### 2.3.3.5. The Transit Driver does not have an Objectively Reasonable Expectation of Privacy

Even if one were to assume that the training and accident records have a legally protected privacy interest, this decision must next determine if the transit driver would have an objectively reasonable expectation that these records would be kept private. A reasonable expectation of privacy "is an objective entitlement founded on broadly based and widely accepted community norms." (*Hill*, *supra*, 7 Cal.4th, at 37.) "Customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable privacy expectations." (*Id.*, at 36.)

It does not appear credible that there could be any reasonable expectation of privacy as to a transit driver's training and accident records given the reporting requirements the Commission enacted with GO 164-D to assist it to perform its oversight function of California's Rail Fixed Guideway Systems. Entities such as SFMTA are required to submit written documentation of their system safety plans which include, at a minimum, the following:

First, a description of the process used to perform accident notification, investigation, and reporting, including:

1. Notification thresholds for internal and external organizations;
2. Accident investigation process and references to procedures;
3. The process used to develop, implement, and track corrective actions that address investigation findings;
4. Reporting to internal and external organizations; and
5. Ensuring full participation and coordination with the Commission.

Second, a description of the training and certification program for employees and contractors, including:

1. Categories of safety-related work requiring training and certification and the required retraining and recertification period for each category;
2. A description of the training/retraining and certification/recertification program for employees and contractors in safety-related positions;
3. Process used to maintain and access employee and contractor training records; and
4. A process used to assess compliance with training and certification requirements.

As training and accident documentation must be provided to the Commission, and the Commission is charged with reviewing these records, there does not appear to be an objectively reasonable expectation of privacy for a particular transit driver's training and accident records, especially as the request is tied to a fatality allegedly caused by the transit driver.

Finally, the conclusion that there is no objectively reasonable expectation of privacy is not altered by the Declaration of the transit driver, Cesar Cabatbat, that the SFMTA attached as Exhibit A to its March 17, 2014 Reply Brief, and referenced again in the SFMTA's Post-Hearing Brief, at 10. First, his statement that "I consider the redacted information in the Requested Records to be private" is nothing more than a personal opinion masquerading as a legal conclusion.[18] The law in California is clear that conclusions and expressions of a declarant's subjective state of mind shall be disregarded. (*See Baron v. Mare* (1975) 47 Cal.App.3d 304, 309.) Declarations that are conclusionary in nature rather than

[18] Cesar Cabatbat Declaration at 4.

evidentiary carry no weight. (*See Hoover Community Hotel Development Corporation v. Thompson* (1985) 167 Cal.App.3d 1130, 1136-1137.) Second, nor do we give any weight to Mr. Cabatbat's attempt to justify his opinion by quoting the California Constitution, Art. I § 1. It is also settled procedure that declarations should not contain legal argument as "the proper place for argument is in points and authorities, not declarations." (*In re Marriage of Heggie* (2002) 99 Cal.App.4th 28, 30, fn. 3.)

#### 2.3.3.6. The Production of the Unredacted Training and Accident Records Would not Constitute a Serious Invasion of a Privacy Interest

*Hill* offered the following guidance for determining a serious invasion of privacy:

> Actionable invasions of privacy must be sufficiently serious in their nature, scope, and actual or potential impact to constitute an egregious breach of the social norms underlying the privacy right. Thus, the extent and gravity of the invasion is an indispensable consideration in assessing an alleged invasion of privacy.[19]

As there is neither a legally protected privacy interest nor a reasonable expectation of privacy, requiring the unredacted production of the training and accident records would not constitute a serious invasion of a privacy interest.

But even if a legally recognized claim of privacy as to the transit driver's training and accident records could be established, the unredacted training and accident records must still be produced. In *Hill*, the California Supreme Court opined that "privacy interests are not absolute; they must be balanced against other important interests. (7 Cal.4th at 37.) Courts have been admonished not to

[19] 7 Cal.4th at 37.

"play the trump card of unconstitutionality to protect absolutely every assertion of individual privacy." (*Wilkinson v. Times Mirror Corporation* (1989) 215 Cal.App.3d 1034, 1046.) Accordingly, the invasion of a claimed privacy interest will not violate the right to privacy "if the invasion is justified by a competing interest. Legitimate interests derive from the legally authorized and socially beneficial activities of government and private entities." (*Hill, supra*, 7 Cal.4th , at 38.)

In this proceeding, there is a clear competing and compelling interest that justifies any claimed privacy intrusion. As discussed, *supra*, and in the Scoping Ruling,[20] the Commission has been vested with the jurisdiction over the safety of all transit agencies within California. (*Los Angeles Metropolitan Transit Authority, supra*, 59 Cal.2d, at 870; *People v. Western, supra*, 42 Cal.2d, at 635; Pub. Util. Code §§ 309.7, 768, 99152; and 49 U.S.C. §§ 659.35 and 5301, *et seq*.) Additionally, pursuant to Pub. Util. Code § 315, the Commission is required to "investigate the cause of all accidents occurring within this State," and is tasked to orders or recommendation "with respect thereto as in its judgment seems just and reasonable." In order to perform this statutory function, RTSS needs to obtain and review the unredacted training and accident records of the transit driver involved in the December 1, 2012, fatal incident in order to determine the causal and contributing factors behind the transit incident, and to propose a corrective action plan as required by 49 U.S.C. § 659.35. (*See* also Civil Code § 1798.24(e).[21]

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[20] At 5-7.

[21] Civil Code § 1798.24(e):

> To a person, or to another agency where the transfer is necessary for the transferee agency to perform its constitutional or statutory duties, and the use is compatible with a purpose for which the information was collected

*Footnote continued on next page*

Because in this instance the need to promote public safety outweighs any claims of privacy, it was inexcusable for the SFMTA not to produce unredacted copies of the transit driver's training and accident records to RTSS.

### 2.4. The SFMTA's Defenses to a Finding of Contempt are Legally Unsound

The SFMTA asserts that its objections to the subpoena *duces tecum's* demand for the train operator's records were made in good faith based on its belief that the train operator had a privacy right to maintain the confidentiality of employment records evaluating his performance. (Friedlander Testimony, page 3, ¶ 12; Reporter's Transcript [RT], at 24:4-21.) Friedlander testified that the SFMTA consulted with both its general counsel and additional counsel with expertise in employment to determine how best to respond. (*Id.*) As added claimed justification for not producing the unreadacted records, the SMTA asserts:

- The train operator was asserting his privacy rights in this case;[22]
- In unrelated litigation, the Superior Court had prohibited the SFMTA from disclosing information that linked evidence of an operator's performance to the name of any individual employee;[23]

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and the use or transfer is accounted for in accordance with Section 1798.25. With respect to information transferred from a law enforcement or regulatory agency, or information transferred to another law enforcement or regulatory agency, a use is compatible if the use of the information requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency or for licensing, certification, or regulatory purposes by that agency.

[22] *Id.*, at 10; Declaration of Cesar Cabatbat.

[23] Friedlander Testimony, at 4, 13.

- In prior accident investigations, the Commission staff had "consistently reviewed" employment records at the SFMTA offices, thus avoiding any concerns about public disclosure of confidential records to the public;[24]
- Before this proceeding, Commission staff had never asserted that reviewing employment records at the SFMTA offices interfered with the Commission's effective investigation of a SFMTA collision;[25] and
- Commission precedent and California case law recognize that individual public employees have a privacy interest in their employment records.[26] A private party seeking the disclosure must demonstrate a compelling need for access and there are no less intrusive means of obtaining the needed information.[27]

This decision addresses each of these arguments.

#### 2.4.1. Good Faith is not a Defense to a Charge of Contempt

The defense of good faith is not a defense to the charge of contempt before the Commission. This is also true for contempt proceedings in superior court. (*See Conn, supra,* 196 Cal.App.3d, at 788 ["While petitioners' defense of good faith is not a defense to the charge of contempt, it must be considered in determining the appropriateness of requiring petitioners to accumulate an enormous fine while awaiting adjudication of the contempt."].)

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[24] *Id*. at 14.

[25] *Id.*

[26] SFMTA Post-Hearing Opening Brief at 10-12.

[27] *Id.* This argument is a refreshed version of the argument the SFMTA made regarding Legal Issue Three that the assigned ALJ's Ruling resolved against the SFMTA. (The SFMTA's Brief on Legal Issues One, Two, and Three, at 4-5; ALJ's Ruling, at 18-27; Ruling 9, 10, and 11.)

#### 2.4.2. Even if Good Faith were a Defense, which it is not, the SFMTA's Showing is Insufficient to Avoid a Finding of Contempt

##### 2.4.2.1. The Transit Operator's Assertion of Privacy Rights Cannot Overcome the Commission's Statutory Duty to Obtain and Analyze Unredacted Training and Accident Records

For the reasons set forth, *supra*, this decision rejects the SFMTA's reliance on the Transit Operator's assertion of privacy rights. Furthermore, given the Commission's clear directive to obtain the personnel records of the transit operator involved in the accident, and that the balancing factors are resolved in favor of the Commission's need for and duty to obtain these records, regardless of what the Transit Operator may assert, the SFMTA is duly bound to comply with the terms of the subpoena *duces tecum*.

##### 2.4.2.2. The Superior Court's Prohibition Against the SFMTA from Producing Transit Operator Records is Irrelevant as the Cases are Factually Distinguishable

Friedlander testified that multiple cases have been filed in the San Francisco Superior Court against the SFMTA for records regarding transit operator performance records. She singles out two cases—one by a local media outlet and one by the Transport Workers Union, Local 250A—and claims the San Francisco Superior Court prohibited the SFMTA from providing the information to the media outlet in a way that linked evidence of an operator's performance to the name of any individual employee. Finally, Friedlander claims to be aware of "California case law holding that an employer may be liable in tort for violating the privacy rights of its employees."

But these cases do not involve the Commission, a government agency specifically tasked with the responsibility of gathering information from transit operators in order to determine the cause of accidents and to propose safety improvements. In fact, there is no assertion that a local media outlet or the Transport Workers Union, Local 250A has the same statutory duties as the Commission. Nor does SFMTA establish that the case law holding an employer liable for violating the privacy rights of its employees involved a subpoena *duces tecum* issued by this Commission.

As such, these arguments are factually distinguishable and are, therefore, irrelevant.

#### 2.4.2.3. The Alleged Patterns and Practices of Staff in Prior Commission Investigations do not Excuse the SFMTA from Complying with the Subpoena *Duces Tecum*

Friedlander testified that in prior investigations, Commission staff came to the SFMTA's offices to review employment records and believed that this was a reasonable course of conduct that could have been followed in this instance. By making this argument, it appears that the SFMTA is asserting that the Commission is estopped from finding the SFMTA in contempt based on Commission staff's prior actions under similar circumstances.

This decision rejects this argument for two reasons. First, prior practices cannot bind the Commission as to future conduct. The California Supreme Court made this clear in *Sale v. Railroad Commission* (1940) 15 Cal.2d 612, where in the context of Commission decisions and orders, the Court states that prior Commission decisions and orders are not "*res judicata* in the sense in which that doctrine is applied in the law courts." The Court went on to state that the

Commission "has continuing jurisdiction to rescind, alter or amend its prior orders at any time." It would be inconsistent that the Commission can change its prior orders yet Commission staff could not act in a way contrary to a prior pattern of conduct.

Second, invoking and applying an estoppel argument would conflict with the Commission's continuing duty to protect the ratepaying public. In *Order In the Matter of the Application of San Diego Gas & Electric Company for Authority to Increase its Rates and Charges for Electric and Gas Service,* Decision 82-12-058, 1982 Cal. PUC LEXIS 1307, the Commission stated that it "can never be estopped from acting fairly and reasonable, balancing the intersts of utility customers, investors, and employees, all of whom are entitled to rely on the Commission's acting fairly and rationally, using the best information available." How can the Commission be expected to fulfill its public safety duties if it does not obtain the records responsive to the subpoena *duces tecum?* Thus, regardless of what may have occurred in those prior instances, the Commission's duty to conduct a complete investigation into a transit accident trumps any attempt by the SFMTA to rely on prior instances to avoid producing unredacted accident and training records to the Commission's staff.

#### 2.4.2.4. Since the Commission is Tasked with the Duty to Investigate Transit Accidents, it Would be Redundant to also Require the Commission to Establish a Compelling need for the Transit Operator's Employment Records

This decision rejects the SFMTA's argument that the Commission must demonstrate a compelling need to overcome the claimed privacy interest of the employee in his employment records. The SFMTA's argument is premised on

the lead-in phrase "A *private party* seeking disclosure of information" and then cites to *San Diego Trolly v. Superior Court* (2001) 87 Cal.App.4th 1083, 1095; *Harding Lawson Associates v. Superior Court* (1992) 10 Cal.App.4th 7, 10; *Versaci v. Superior Court* (2005) 127 Cal.App.4th 805, 819; *Ripskis v. Dept. of Hous. & Urban Dev.* (D.C. Cir. 1984) 746 F.2d 1, 3; and *Celmins v. U.S. Dept. of Treasury* (D.D.C. 1997) 457 F.Supp. 13, 15.[28] Yet, in each of these cases it was a private party seeking the disclosure of personnel-related records. In contrast, the Commission is a government agency specifically tasked with the duty to conduct accident investigations of California Rail Transit Agencies such as the SFMTA. (*Los Angeles Metropolitan Transit Authority v. Public Utilities Commission* (1963) 59 Cal.2d 863, 870; *People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 635; Pub. Util. Code §§ 309.7(a), 768, 29047, 99152; and 49 U.S.C. § 5301 et seq.) As discussed, *supra*, the Commission also has the authority to issue subpoenas to compel the production of documents.

Thus, the "compelling need," assuming for the moment that standard is even applicable, is already imbedded in the statutes and case law that vest the Commission with the duty to investigate and to obtain the transit driver's training and accident records related to transportation incidents such as the one that occurred on December 1, 2012, and is at the heart of this proceeding.

[28] SFMTA Post-Hearing Opening Brief at 10.

#### 2.4.2.5. GO 66-C and Resolution No. L-436 do not Provide the SFMTA with Justification for Disobeying the Subpoena *Duces Tecum*

The SFMTA fares no better by its reliance on § 2.5 of the Commission's GO 66-C and Resolution No. L-436 (Resolution Regarding the Disclosure of Safety-Related Records), issued February 14, 2013.[29] Both the GO and the Resolution were adopted to guide the Commission in responding to CPRA requests (Government Code § 6259 et seq.), rather than undercut the Commission's authority to investigate and obtain records related to transportation incidents. As such, neither GO 66-C § 2.5 nor Resolution No. L-436 were designed to be used as a shield by entities seeking to refuse to comply with a Commission issued subpoena *duces tecum*.

#### 2.4.2.6. The SFMTA's Fear of Possible Tort Liability is not Justification for Disobeying the Subpoena *Duces Tecum*

Finally, we are unpersuaded by the SFMTA's argument that its refusal to produce the unredacted personnel records was justified out of its concern that it faced potential tort liability.[30] The decision upon which the SFMTA relies, *Payton v. City of Santa Clara* (1982) 132 Cal.App.3d 152, is factually distinguishable. In *Payton*, plaintiff sought damages from the City of Santa Clara after it posted, in a public employee workroom, a memorandum that advised plaintiff of his termination and the reasons therefore. The Court held that plaintiff stated a cause of action for a violation of his right to privacy under article I, § 1, of the

[29] *Id.* at 11.

[30] *Id.*

California Constitution, since he properly alleged that his employer made improper use of the memorandum by posting it in public: "Appellant has pleaded adequately that respondents engaged in such mischief: improper use of information properly obtained." (*Id*. at 154.) In contrast, the SFMTA was served by a subpoena *duces tecum* issued by the Commission's Executive Director, a subpoena *duces tecum* to which the SFMTA was obligated to comply. We reject the notion that compliance with a properly issued subpoena *duces tecum* is the type of mischief contemplated by *Payton* that would give rise to a private right of action for invasion of privacy.

#### 2.4.2.7. The SFMTA's June 4, 2014 Production of the Unredacted Records does not Prevent the Commission from Finding that the SFMTA is in Contempt, of from Fining the SFMTA for its 14-Month Disobedience of the Subpoena *Duces Tecum*

The SFMTA cites *In re Nolan W.* (2009) 45 Cal.4th 1217 for the proposition that once it complied with the subpoena *duces tecum*, the Commission lost its ability to fine the SFMTA, reasoning that the civil contempt SED advocated is a forward-looking remedy that may not be used, like a criminal contempt, to punish past conduct in violation of a court order.[31] Carrying the SFMTA's argument through to what appears to be its purported conclusion, a respondent may flaunt a Commission's subpoena but cannot be penalized *via* a civil contempt proceeding as long as it complies with the subpoena before the Commission has found the respondent to be in contempt.

[31] SFMTA Post-Hearing Brief at 12.

This decision rejects the SFMTA's argument. "It is well settled that the court has inherent power to enforce compliance with its lawful orders through contempt." (*In re Nolan, supra,* 45 Cal.4th, at 1230.) The power to hold a party or respondent in contempt "is a summary procedure designed to protect the dignity of the court in the exercise of its jurisdiction." (*Id.* at 1231.) While the power to make a finding of contempt was originally vested with courts of general jurisdiction, the Legislature extended that power to various government entities such as the Commission, who the Legislature granted contempt authority by the enactment of Pub. Util. Code § 2113. In *Nolan,* the California Supreme Court explained that contempt can be either civil or criminal in nature, and explained the distinction as follows:

> Where the primary object of contempt proceedings is to protect the rights of litigants, the proceedings are regarded as civil in character. On the other hand, where the object of the proceedings is to vindicate the dignity or authority of the court, they are regarded as criminal in character even though they arise from, or are ancillary to, a civil action.[32]

Civil contempt is a "forward-looking remedy imposed to coerce compliancy with a lawful order of the court… On the other hand, so long as specific procedures are observed to safeguard due process, criminal contempt may be used to punish past conduct in violation of a court order. The object of such proceedings is to vindicate dignity or authority of the court." (45 Cal.4th at 1236.)

Similarly, the Commission's subpoena *duces tecum* was designed to compel future compliance. It was issued on March 14, 2013 and demanded compliance by April 9, 2013. (Exhibit A, Attachment 5.) The subpoena *duces tecum* then

[32] 45 Cal.4th at 1236.

stated that disobedience may be punished as contempt by the Commission. (*Id*.) Thus, this situation is similar to *New York State National Organization for Women v. Terry* (2d Cir. 1989) 886 F.2d 1339, 1351, upon which the SFMTA relies, since in both instances the threat of contempt was a prospective fine plainly intended to coerce compliance with an official order. Once that future compliance did not occur, the trial court in *New York State* was within its power to impose a compensatory sanction of $19,141. Accordingly, the SFMTA can be held in contempt and punished for its failure to comply with the April 9, 2013 production of the documents, and the Commission does not lose that authority simply because the SFMTA has now elected to produce the subpoenaed records before there has been a Commission decision.

In sum, the evidence supports the conclusion, beyond a reasonable doubt, that the SFMTA is in contempt for disobeying the March 14, 2013 subpoena *duces tecum* and should be fined $1,000.00. The Commission's authority to fine the SFMTA this amount is found in the language of Pub. Util. Code § 2113 where it states "is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by a court of record." In superior court, pursuant to Code of Civil Procedure § 1218(a), the maximum monetary civil penalty for a single act of contempt is $1,000.00.

But the Commission is not limited to fining the SFMTA $1,000.00. Pub. Util. Code § 2113 states that the remedy allowed "does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto." In other words, the findings made here for the SFMTA's contempt, can also be utilized by the Commission to impose additional fines for violating Rule 1.1. We, therefore, discuss the legal propriety of imposing additional fines on the SFMTA.

### 2.5. By Disobeying the Subpoena *Duces Tecum* from April 9, 2014, the SFMTA Violated Rule 1.1 of the Commission's Rules of Practice and Procedure

Rule 1.1 of the Commission's Rules of Practice and Procedure states:

> Any person who signs a pleading or brief, enters an appearance at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission or its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

#### 2.5.1. The Burden of Proof

The burden of proof for establishing a Rule 1.1 violation is not as stringent as the burden of proof for establishing contempt. The Commission has determined that a person subject to the Commission's jurisdiction can violate Rule 1.1 without the Commission having to find that the person intended to disobey a Commission Rule, Order, or Decision. Instead, in D.01-08-019, the Commission ruled that intent to violate Rule 1.1 was not a prerequisite but that "the question of intent to deceive merely goes to the question of how much weight to assign to any penalty that may be assessed. The lack of direct intent to deceive does not necessarily, however, avoid a Rule 1 violation." Thus, as the Commission later reasoned in D.13-12-053, where there has been a "lack of candor, withholding of information, or failure to correct information or respond fully to data requests," the Commission can and has found a Rule 1.1 violation.[33]

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[33] *Final Decision Imposing Sanctions for Violation of Rule 1.1 of the Commission's Rules of Practice and Procedure*, at 21. *See* also D.09-04-009 at 32, Finding Of Fact 24 [Utility was "subject to a fine for its violations, including noncompliance with Rule 1.1, even if the violations were

*Footnote continued on next page*

The party claiming the violation must establish that fact "by a preponderance of the evidence."[34]

### 2.5.2. The Commission's Position that Intent to Disobey the Subpoena *Duces Tecum* is not a Necessary Element is Supported by the Plain Meaning of Rule 1.1

In interpreting this Rule, the Commission adheres to California's settled rules of statutory construction, which also apply equally to interpret Commission rules and tariffs.[35] First, we must consider the plain language of the Rule itself.[36] If the plain words are clear and unambiguous, then the inquiry ends.[37] Here, the plain language of Rule 1.1 does not state that there must be a purposeful intent to mislead the Commission or its staff. If Rule 1.1 was meant to have that

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inadvertent…"; D.01-08-019, at 21 Conclusion Of Law 2 ["The actions of Sprint PCS in not disclosing relevant information concerning NXX codes in its possession in the Culver City and Inglewood rate centers caused the Commission staff to be misled, and thereby constitutes a violation of Rule 1."]; D.94-11-018, (1994) 57 CPUC2d, at 204 ["A violation of Rule 1 can result from a reckless or grossly negligent act."]; D.93-05-020, (1993) 49 CPUC2d 241, 243 [citing to Rule 1 and Pub. Util. Code § 315 for the proposition that "all public utilities subject to our jurisdiction…are under a legal obligation to provide the Commission with an accurate report of each accident[.]…Withholding of such information or lack of complete candor with the Commission regarding accidents would of course result in severe consequences for any public utility."]; and D.92-07-084, (1992) 45 CPUC2d 241, 242 ["Therefore, by failing to provide the correct information in its report, and in not informing the Commission of the actual assignment, Southern California Gas & Electric Company (SoCalGas) misrepresented and misled the Commission….By behaving in such a manner, SoCalGas violated Rule 1."].

[34] 49 CPUC2d, at 190, citing to D.90-07-029 at 3-4.

[35] *See* e.g. *Pac-West Telecomm, Inc. v. Pacific Bell Telephone Company*, D.03-03-045 (2003); *Masonite Corporation v. Pacific Gas and Electric Company* (1976) 65 Cal.App.3d 1, 8-9.

[36] *People v. Canty* (2004) 32 Cal.4th 1266, 1276-1277; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

[37] *Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 121 ["Accordingly, if there is no ambiguity in the language, we presume the Legislature meant what it said and the plain meaning of the statue governs."].

requirement, the Commission would have included that language when the Rule was adopted and would have included the language "never purposefully deceive or mislead" or "never knowingly deceive or mislead." Those plain words are not in Rule 1.1.

The undisputed facts establish that the SFMTA violated Rule 1.1 when it disobeyed the subpoena *duces tecum* by not producing the unredacted copies of the transit driver's training and accident records by the deadline set in the subpoena *duces tecum*, or by any later due dates that the Commission's staff established or agreed to. It elected to withhold information i.e. the redacted portions of the transit driver's training and accident records that were subject to the subpoena *duces tecum*. By doing so, the SFMTA failed to comply with the laws of this state and misled the Commission by an artifice or false statement of law by claiming that the transit driver's training and accident records had information in them that did not have to be physically produced to the Commission.

### 2.6. By Disobeying the Subpoena *Duces tecum*, the SFMTA is Subject to Penalties Pursuant to Pub. Util. Code § 2107

Pub. Util. Code § 2107 states:

> Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than fifty thousand dollars ($50,000) for each offense.

The Commission has broad authority to impose fines and penalties on persons subject to the Commission's jurisdiction. In *Pacific Bell Wireless, LLC v.*

*Public Utilities Commission of the State of California* (2006) 140 Cal.App.4th 718, 736. the Court, citing the California Supreme Court's decision of *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 905-906, spoke to the Commission's broad powers:

> The Commission is a state agency of constitutional origin with far-reaching duties, functions and powers. The Constitution confers broad authority on the commission to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures. The Commission's powers, however, are not restricted to those expressly mentioned in the Constitution: The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission.

As part of the expansive authority, the courts have recognized that the Commission has the authority to impose fines directly on public utilities without the need to first commence an action in Superior Court. (140 Cal.App.4th, at 736.) Instead, the Commission has determined that it need only commence an action in superior court to collect unpaid fees. (*Id.*, citing to Cal.P.U.C. *Order Denying Rehearing of Decision* 99-11-044 (Mar. 2, 2000) Dec. No. 00-03-023 [2004 Cal.P.U.C. Lexis 127, *6-7]; *Re Communications TeleSystems International* (1997) 76 Cal.P.U.C.2d 214, 219-220, 224, fn. 7; *Toward Utility Rate Normalization (TURN) v. Pacific Bell* (1994) 54 Cal.P.U.C.2d 122, 124.) "The Commission's interpretation of its own statutory authority should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." (140 Cal.App.4th, at 736, citing *PG&E Corporation v. Public Utilities Commission* (2004) 118 Cal.App.4th 1174, 1194.)

### 2.6.1. Burden of Proof

When there is a Rule 1.1 violation, a fine "can be imposed under § 2107." (*See* 57 CPUC2d, at 205.) Thus, the same preponderance of the evidence standard necessarily applies.

That lesser standard is easily met. It is beyond dispute that the SFMTA failed to comply with the Commission's subpoena *duces tecum* when it failed to produce the unredacted copies of the transit driver's training and accident records. That failure violated Rule 1.1 which, in turn, has triggered the Commission's authority to issue fines and penalties.

Further, Pub. Util. Code § 2108 states:

> Every violation of the provisions of this part or of any part of any order, decision, decree, rule, direction, demand, or requirement of the Commission, by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.

For decades, the Commission has relied on this statutory provision to assess fines for each day that a utility is in violation of a Commission order or law.[38] Without question, the Commission's ability to impose penalties on public utilities is supported by the plain reading of Pub. Util. Code § 2107.

Fines imposed under Pub. Util. Code § 2107 must be deposited in the California General Fund.[39]

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[38] *See*, e.g., *Carey*, D.98-12-076, 84 CPUC2d 196, Ordering Paragraph (OP) 1 (1998); D.98-12-075, 1998 Cal. PUC LEXIS 1016, *56 (discussion the policy behind daily fines and affirming that "[f]or a "continuing offense," Public Utilities Code § 2108 counts each day as a separate offense.").

[39] *Assembly v. Public Utilities Commission* (1995) 12 Cal.4th 87, 102-103.

## 3. Criteria for the Assessment of the Size of a Rule 1.1 and Pub. Util. Code § 2107 Fine

D.98-12-075, and Pub. Util. Code §§ 2107-2108, provide guidance on the application of fines.[40] As stated in D.98-12-075, two general factors are considered in setting fines: (1) the severity of the offense and (2) the conduct of the utility. In addition, the Commission considers the financial resources of the utility, the totality of the circumstances in furtherance of the public interest, and the role of precedent. (D.98-12-075, mimeo at 34-39.)[41] We discuss the specific criteria and determine below its applicability to the SFMTA's conduct.

### 3.1. Criterion 1: Severity of the Offense

In D.98-12-075, the Commission held that the size of a fine should be proportionate to the severity of the offense. To determine the severity of the offense, the Commission stated that it would consider the following factors.[42]

- **Physical harm**: The most severe violations are those that cause physical harm to people or property, with violations that threatened such harm closely following.
- **Economic harm**: The severity of a violation increases with (i) the level of costs imposed upon the victims of the violation, and (ii) the unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic

[40] D.98-12-075 indicates that the principles therein distill the essence of numerous Commission decisions concerning penalties in a wide range of cases, and the Commission expects to look to these principles as precedent in determining the level of penalty in a full range of Commission enforcement proceedings. (*Mimeo* at 34-35.)

[41] In deciding the amount of a penalty, the Commission also considers the sophistication, experience and size of the utility; the number of victims and economic benefit received from the unlawful acts; and the continuing nature of the offense. (*See* D.98-12-076, *mimeo* at 20-21.) These principles are distilled into those identified in D.98-12-075.

[42] 1998 Cal. PUC LEXIS 1016, 71-73.

harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.

- **Harm to the regulatory process**: A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements.
- **The number and scope of the violations**: A single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope.

The SFMTA's violation of Rule 1 harmed the regulatory process by failing to produce the unredacted copies of the transit driver's training and accident records. This failure impeded the Commission staff's ability to carry out its statutory duties to investigate transportation accidents and to make recommendations for the improvement of conditions to prevent similar accidents in the future. This is one of the paramount safety features that the Commission is tasked with and any action by a regulated entity that interferes with that duty harms the regulatory process.

### 3.2. Criterion 2: Conduct of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the conduct of the utility. When assessing the conduct of the utility, the Commission stated that it would consider the following factors:[43]

- **The Utility's Actions to Prevent a Violation**: Utilities are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The utility's past

[43] 1998 Cal. PUC LEXIS 1016, 73-75.

record of compliance may be considered in assessing any penalty.

- **The Utility's Actions to Detect a Violation**: Utilities are expected to diligently monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, will be considered an aggravating factor. The level and extent of management's involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty.
- **The Utility's Actions to Disclose and Rectify a Violation**: Utilities are expected to promptly bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by a utility to promptly and cooperatively report and correct violations may be considered in assessing any penalty.

Here, the SFMTA had the ability all along to comply with the subpoena *duces tecum* yet declined to do so by interposing a series of unsound legal arguments and objections.

### 3.3. Criterion 3: Financial Resources of the Utility

In D.98-12-075, the Commission held that the size of a fine should reflect the financial resources of the utility. When assessing the financial resources of the utility, the Commission stated that it would consider the following factors:[44]

- **Need for Deterrence**: Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the utility in setting a fine.
- **Constitutional Limitations on Excessive Fines**: The Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources.

[44] 1998 Cal. PUC LEXIS 1016, 75-76.

As we will explain, the SFMTA has the financial wherewithal to pay a substantial fine.

### 3.4. Criterion 4: Totality of the Circumstances

In D.98-12-075, the Commission held that a fine should be tailored to the unique facts of each case. When assessing the unique facts of each case, the Commission stated that it would consider the following factors:[45]

- **The Degree of Wrongdoing**: The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.
- **The Public Interest**: In all cases, the harm will be evaluated from the perspective of the public interest.

The SFMTA's actions impeded the Commission's staff from exercising its obligations to protect the public interest. In considering the totality of circumstances and degree of wrongdoing in this case, we conclude that a fine for the entirety of the time the SFMTA violated the subpoena *duces tecum* is appropriate.

### 3.5. Criterion 5: The Role of Precedent in Setting the Fine or Penalty Amount

In D.98-12-075, the Commission held that any decision that imposes a fine should (1) address previous decisions that involve reasonably comparable factual circumstances, and (2) explain any substantial differences in outcome.[46]

As precedent for considering the level of fines against the SFMTA, we consider past Commission decisions involving Rule 1 violations that occurred over multiple days. *See*, e.g. *Cingular Investigation*, D.04-09-062 at 62.

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[45] 1998 Cal. PUC LEXIS 1016, 76.

[46] 1998 Cal. PUC LEXIS 1016, 77.

("Section 2108 provides, in relevant part, that 'in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense. Both violations constitute continuing offenses during the relevant time periods. Considering the record as a whole, we find that the penalty for each violation should be calculated on a daily basis.") And Conclusion of Law (COL) 4 ("Pursuant to §§ 2107 and 2108 and Commission precedent, for the violations of law for the period January 1, 2000 to April 30, 2002 (849 days), Cingular should pay a penalty of $10,000 per day, or $8,490,000."); *Qwest*, D.02-10-059 at 43, n. 43 ("Sections 2107 and 2108 address fines. According to § 2107, *Qwest* is liable for a fine of $500 to $20,000 for every violation of the Public Utilities Code or a Commission decision. Pub. Util. Code § 2108 provides that every violation is a separate and distinct offense, and in case of a continuing violation each day's continuance constitutes a separate and distinct offense."); and *SCE's Performance-Based Ratemaking OII*, D.08-09-038 at 111 ("Finally, a fine of $30 million is reasonable when viewed as an ongoing violation that should be subject to a daily penalty, as recommended by CPSD and used by the Commission in the case that was upheld in *Pacific Bell Wireless,LLC v. Pub. Util. Comm'n.* If SCE's violations are viewed as daily violations that continued for seven years, then a $30 million dollar fine equates to a daily penalty of just less than $12,000 ($30 million/7 years/ 365 days.)")

Based on the above precedents, we calculate the SFMTA's fine as follows: 421 days (number of days after the due date that the SFMTA produced unredacted copies of the transit driver's training and accident records) times $500 equals $210,500.

The SFMTA is a part of the City and County of San Francisco. Its Mayor, Edwin M. Lee, presented proposed balanced budgets for the fiscal years

2013-2014, 2014-2015, and 2016.[47] Additionally, San Francisco revealed a surplus of nearly $22 million.[48] We conclude that the fine we establish of $210,500 is significant enough to serve as an incentive to deter future violations. Yet, the amount of the fine is conservative enough not to be excessive in view of the financial health that the City and County of San Francisco currently enjoys.

### 4. Presiding Officer's Decision and the Appeal

On February 13, 2015, the Presiding Officer issued his Presiding Officer's Decision, finding that the SFMTA was in contempt of the March 14, 2013 subpoena *duces tecum* from SED, RTSS, when it failed to produce, by the response date demanded, the training records and accident records for the SFMTA driver involved in the fatal accident that occurred at the Mission Rock Station in the City and County of San Francisco on December 1, 2012. SFMTA was ordered to pay a fine of $1,000.00. In addition, the Presiding Officer's Decision also found that SFMTA should be fined $210,500.00 for violating Rule 1.1 of the Commission's Rules of Practice and Procedure.

On March 16, 2015, SFMTA filed an appeal and set forth the following arguments: (1) the Presiding Officer's Decision violates due process and Commission rules because SFMTA had no notice that it may be held liable for penalties under Rule 1.1; (2) the Presiding Officer's Decision violates due process because it does not provide any opportunity for a subpoena recipient to object before incurring fines for noncompliance; (3) the record does not support the

[47] http://www.6sfgov.org/ftp/newsarchive/sf.

[48] http://www.sfgate.com/bayarea/articles/S-F-reveals-nearly-22-million-surplus.

finding that SFMTA violated Rule 1.1; and (4) the record does not support the finding of contempt.

### 4.1. SFMTA was on notice that, in addition to contempt, it faced potential penalty/fine liability under Rule 1.1.

SFMTA claims that since the Scoping Ruling did not mention a potential Rule 1.1 violation, SFMTA was deprived of the opportunity to respond to the Rule 1 charge and, as such, deprived of the constitutional guarantee of due process.[49] SFMTA bases its argument on the theory that the failure to make a specific reference to Rule 1.1—or any charge for that matter—is the legal equivalent of failing to give a party adequate notice and a reasonable opportunity to provide a defense.[50] As we shall explain, the requisite notice requirements for due process purposes is more nuanced than SFMTA suggests.

In fact, the question of adequate notice of a potential Rule 1.1 violation was addressed recently in *Pacific Gas and Electric Company v. Public Utilities Commission* (2015) Cal.App. LEXIS 512. On August 19, 2013, the Commission issued an order for Pacific Gas and Electric Company (PG&E) order to show cause (OSC) why it should not be sanctioned for violating Rule 1.1. The OSC gave notice of two specific alleged violations: (1) whether PG&E attempted to mislead the Commission by titling its disclosure filing as an "Errata;" and (2) whether PG&E attempted to mislead the Commission by filing on July 3, 2013, the day before a summer holiday weekend. But the OSC did not state that the Commission would also consider whether PG&E separately violated Rule 1.1 by failing to disclose the corrected pipeline specification information a month after

[49] SFMTA Appeal at 12.

[50] *Id.*

the first preliminary information discovered, or that PG&E might face continuing violation sanctions based on any breach of disclosure or filing obligations. (* 89.)

In rejecting the notion that the precise charges must be set forth in the OSC before the Commission can find that a Rule 1.1 violation occurred, the Court articulated the standards for determining if a denial of due process has occurred. First, due process does not require any particular form of notice. The details can be flexible depending on the circumstances, and this is especially true where administrative procedures are concerned. (* 93.) All that is required is that the notice be reasonable. In articulating this standard, the Court relied on *Lusardi Construction Co. v. Aubry* (1992

) 1 Cal.4th 976, 990; *Drummey v. State Bd. Of Funeral Directors* (1939) 13 Cal.2d 75, 80; *Litchfield v. County of Marin* (1955) 130 Cal.App.2d 806, 813; *Sokol v. Public Utilities Commission* (1966) 65 Cal.2d 247, 254; *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1037; and *Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 936, footnote 7. (*Id.*)

In applying the reasonable notice standard, the Court found that PG&E was on notice of the potential Rule 1.1 violations even if they weren't all articulated in the OSC. The Court noted that the OSC stated that the attempted to filing of the Errata raised procedural and substantive issues, which the Commission called "serious issues." (* 93.) The OSC alerted PG&E that the Errata was procedurally improper because it went beyond correcting minor typographical or computational error and could be interpreted as an attempt create an inaccurate impression of a routine correction. The OSC also notified PG&E that the Commission viewed the Errata as making substantive changes to a previously filed application by revealing a substantial error in an application.

In sum, the Court concluded that a "fair reading of the OSC discloses that the PUC was not merely concerned with how the filing was titled." (* 94.)

The Court also applied the reasonable notice standard to PG&E's claim that since the OSC did not cite Pub. Util. Code § 2108, PG&E was not given notice that it faced the possible financial consequences from a continuing offense. The Court noted that PG&E failed to cite any authority that due process "demands that the full and complete possible adverse consequences be spelled out in the notice." (* 96.) When the Court considered the totality of the record, it concluded that PG&E was on notice of the scope of the potential offenses and the possible financial penalties that could be imposed.

When we apply the standard of reasonable notice to SFMTA's appeal, its due process argument must be rejected. The OII that was issued on September 25, 2013 contained OP 2:

> The assigned Administrative Law Judge will set a hearing. SFMTA and any other interested party shall show cause why the Commission should not order SFMTA to produce the records set forth in the SUBPOENA, hold SFMTA in contempt of SED's Subpoena pending a final determination of the Commission, and impose a fine or penalty under Public Utilities Code §§ 309.7, 2101, 2104, 2107.5, and 2113.[51]

The Scoping Ruling also asks "if the SFMTA is in contempt of the Commission, should the SFMTA be fined or otherwise penalized?"[52]

Pub. Util. Code § 2113 states, in part, that "the remedy prescribed in this section does not bar or affect any other remedy prescribed in this part, but is cumulative and in addition thereto." The statute is clear that a determination of

[51] OII at 10.

[52] Scoping ruling at 6.

contempt would subject the Respondent to additional punishments set forth in Part Two of the Public Utilities Code. One such punishment is provided by Pub. Util. Code § 2107 which states that a violation of any order, direction or rule of the Commission is punishable by a penalty of not less than five hundred dollars , nor more than fifty thousand dollars for each offense. Rule 1.1 is certainly one of the Commission's rules that, if disobeyed through the finding of contempt, would subject SFMTA to additional punishment. And Pub. Util. Code § 2108 states that each day of a continuing violation "shall be a separate and distinct offense." As such, when the OII, the Scoping ruling, and the statutes identified in the OII are read together, they reasonably place a Respondent on notice that a finding of contempt can subject the Respondent to possible Rule 1.1 liability.

We must also address and reject SFMTA's argument that the balance of the record confirms that there was no notice of a potential Rule 1.1 violation. SFMTA relies on the correspondence between SFMTA and SED which are attached as Exhibits A and B to the Emery Declaration as proof that there was no mention at any point prior to the Presiding Officer's Decision of a Rule 1.1 charge.[53] Yet SFMTA overlooks the letter dated April 30, 2013, written by Mr. Berdge and to which Ms. Freidlander was copied, that was appended as Attachment 8 to the OII and entered into evidence. The letter states in part that "SED seeks to hold Mr. Reiskin and the SFMTA in contempt of the Commission pursuant to the SDT and California Public Utilities Code Sections 312, 1701, and 2113, and California Code of Regulations § 10.2 for failure to comply with the SDT and obstructing SED's investigation of this fatal accident." The reference to

[53] SFMTA Appeal at 12.

California Code of Regulations § 10.2 is instructive for when one looks at this section, subparagraph (f) states:

> (f) Anyone who disobeys a subpoena issued pursuant to this rule may be found to be in contempt of superior court and punished accordingly, as provided in Public Utilities Code Sections 1792 and 1793. In appropriate circumstances, such disobedience may be found to be a violation of Rule 1.1, punishable as contempt of the Commission under Public Utilities Code Section 2113.

When the totality of the circumstances are considered, we conclude that SFMTA had reasonable notice that violation of Rule 1.1 was within the scope of potential violations for which SFMTA could be punished in this proceeding.

In reaching this conclusion, we also find SFMTA's cited authority to be distinguishable in that the operative pleading or ruling from the Commission that initiated the proceeding did not give any indication that the respondent was facing liability for fines of penalties. For example, in *re San Gabriel Valley Water Company* (2007) D.07-04-046; order modifying opinion (2008) D.08-06-024 at p. 17, the question of penalties was not part of the scoping memo. Instead, it was a rulemaking proceeding, and the request for monetary penalties was not raised until late in the proceeding.

Also, this is not a situation of the late assertion of new charges in administrative proceedings which occurred in *Smith v. State Board of Pharmacy* (1995) 37 Cal.App.4th 229, 241-243, another of SFMTA's cited authorities. An employee was accused of personally dispensing or furnishing drugs. At the closing argument before the ALJ, counsel for the Board conceded that he shifted the Board's case to one of negligence against the employee. Smith was misled by the accusation into believing that he needed to prepare a defense to the personal dispensing charges. Had he been aware of the negligence, Smith would have

presented expert testimony on the appropriate standard of care. Also, Government Code § 11503 establishes that "the accusation, shall set forth in ordinary and concise language the acts or omissions with which the respondent is charged, to the end that the respondent will be able to prepare his defense. It shall specify the statutes and rules which the respondent is alleged to have violated, but shall not consist merely of charges phrased in the language of such statutes and rules." In contrast, SFMTA was always on notice that the potential scope of fines and penalties could be based on a Rule 1.1 violation.

SFMTA's other cited authority, *Southern California Edison Co. v. Public Utilities Commission* (2006) 140 Cal.App.4th 1085, is equally unpersuasive. There the Court annulled the Commission's decision, in part, because it was based on an issue not identified in the Scoping Ruling. The ruling described the issues to be addressed as whether to adopt rules to prohibit bid shopping and reverse auctions consistent with rules governing state and federal public works contracts, but did not mention that the proceeding would consider a proposed prevailing wage requirement. The Court found this to be a new issue beyond the scope of the identified issues, and that the parties had insufficient time to respond to the new proposals. Here, the question of fines and penalties for contempt was not a new issue—it was the issue that was identified at the start of this proceeding and in the Scoping Ruling.

Finally, even if one were to countenance SFMTA's due process argument, we must also address the issue of how was SFMTA prejudiced. In *PG&E*, the Court recognized that in administrative proceedings, "'a variance between the allegations of a pleading and the proof will not be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense on the merits, and a variance may be disregarded when the action has

been as fully and fairly tried on the merits as though the variance had not existed.'" (* 98, quoting *Stearns v. Fair Employment Practice Com*. (1971) 6 Cal.3d 205, 213.) Here, SFMTA makes no showing what testimony or evidence it would have offered if the Scoping Ruling explicitly listed Rule 1.1. Instead it asserts, without any factual support, that it "was deprived an opportunity to respond to the Rule 1 charge and deprived of the constitutional guarantee of due process."[54] All the correspondence between SED and SFMTA regarding the subpoena *duces tecum* has been attached, collectively, to the OII, the testimony of Freidlander, and the Emery Declaration. SFMTA has made a plethora of legal and factual arguments that have been addressed in the Presiding Officer's Decision and in this Modified Presiding Officer's Decision. Thus, it is unclear, and SFMTA sheds no light on this question, what else SFMTA would have argued or what additional evidence would have been presented. This absence of proof was deemed fatal to the claimed denial of due process argument in *PG&E*: "And when PG&E sought rehearing, it did not claim that its ability to present a defense had been compromised. It made nothing akin to an offer of proof, identifying no testimony or other evidence it would have presented had it realized the full scope of what the OSC entailed. Nor does PG&E attempt to do so in its petition. With due regard for the totality of these circumstances, we conclude that any imprecision in the OSC did not prejudice PG&E in presenting its defense." (*99.)

We reach a similar conclusion of no prejudice to SFMTA here.

[54] SFMTA Appeal at 12.

### 4.2. SFMTA was Afforded Due Process to Object to the Subpoena *Duces Tecum* Before it Incurred Fines for Noncompliance

SFMTA asserts that due process requires that it have an opportunity to adjudicate its objections to the subpoena *duces tecum* before it incurs liability for contempt or for violating Rule 1.1.[55] Since any objection to the subpoena *duces tecum* was going to subject it to fines and contempt, it effectively was deprived of procedural due process.

We reject SFMTA's argument as it was entitled to procedural due process. As set forth, *supra*, at § 2.3, even though it was late in responding, SFMTA was allowed to object to the subpoena *duces tecum*. SFMTA was allowed to engage in a dialogue with SED's counsel in an effort to resolve this dispute. On separate occasions, the Commission's then General Counsel (Frank Lindh) and SED's counsel (Berdge) made overtures to SFMTA to comply with the subpoena *duces tecum* without penalty.[56] Instead, SFMTA elected to roll the dice rather than produce the unredacted documents to SED as required by the subpoena *duces tecum*. It made a series of legal and factual arguments, none of which were well taken as discussed above. As SFMTA never had a legitimate factual or legal basis not to comply with the subpoena *duces tecum*, it was appropriate to time the commencement of the contempt and the Rule 1.1 violation time frames from the date that compliance with the subpoena *duces tecum* was required. Any later compliance with the subpoena *duces tecum* does not nullify SFMTA's prior noncompliance.

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[55] SFMTA Appeal at 14.

[56] See Freidlander Direct Testimony, Attachment 8; and OII, Attachment 12.)

### 4.3. The Record Supports the Decision's Finding that SFMTA Violated Rule 1.1.

SFMTA asserts that the Commission "has held unambiguously" that Rule 1.1 violations require purposeful intent, recklessness, or gross negligence.[57] SFMTA goes further and claims that a failure to correctly cite a proposition of law, a lack of candor or withholding information, a failure to correctly inform, or to correct mistaken information, violates Rule 1.1 only if the conduct is reckless or grossly negligent.[58] In SFMTA's view, there is a Rule 1.1 violation only if the omission or failure to disclose actually misleads the Commission.[59]

Yet SFMTA's assessment of the law is not as cut and dry as it would like this Commission to believe. While it is true that there have been Commission standards that required a Rule 1.1 violation to require purposeful intent, there is an equally robust body of Commission decisions that have not required proof of intent in order to violate Rule 1.1, but that the question of intent simply goes to the significance of the fine that the Commission may wish to impose. These facially disparate decisions were discussed by the Court in *PG&E*, who resolved the dispute in favor of not requiring proof of intent to find a Rule 1.1 violation. As such, we reject SFMTA's position and interpretation of the operative law.

#### 4.3.1. Rules of Statutory and Regulatory Interpretation

But in view of the importance of this question, and the frequency upon which it has been raised, we set forth *PG&E's* analysis as to why proof of intent is not required for a Rule 1.1 violation. In doing so, we start, as *PG&E* did, by

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[57] SFMTA Appeal at 16, citing to D.04-04-065 at 35; D.02-08-063; and D.94-11-018.

[58] *Id*. citing to D.94-11-018 and D.04-04-065 at 35-36.

[59] *Id*. citing to D.13-04-018 at 17-18.

setting forth the ground rules for interpreting laws enacted by administrative agencies. In *Hoit v. Department of Rehabilitation* (2012) 207 Cal.App.4th 513, 523, the Court states that the "rules of statutory construction govern our interpretation of regulations promulgated by administrative agencies." Regulatory language must be given its plain, commonsense meaning, and a court must accord meaning to every word and phrase in a regulation so that all of the parts are given effect. (*Id.*) "An elementary rule of statutory construction—which applies equally to the interpretation of regulations—is that 'statutes in *pari materia*—that is, statutes relating to the same subject matter—should be construed together.'" (*Id.*, quoting from *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13, 22.) On this last point, the Court in *PG&E* stated that in interpreting Rule 1.1:

> Rule 1.1 cannot be divorced from [Pub. Util. Code] section 2107,[60] for the statute—together with the very broad enabling power 'to do all things…which are necessary and convenient' granted by [Pub. Util. Code] section 701—is the source of the authority to impose monetary sanctions for violation of the rule. The rule is an organic extension of the statute, and the validity of the rule cannot be considered while ignoring the statute. Section 2107 and Rule 1.1 are clearly in *pari materia* and are to be construed together, along with section 701. (* 51, footnote 15.)

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[60] Pub. Util. Code § 2107 states:

> Any public utility that violates or fails to comply with any provision of the Constitution of this state or of this part, or that fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500), nor more than fifty thousand dollars ($50,000) for each offense.

The *PG&E* decision first noted that the primary purpose behind a civil penalty is to secure compliance with statutes and regulations imposed to assure public policy objectives (*51.) The Legislature may constitutionally impose reasonable penalties to secure obedience to statutes enacted under the police power, so long as those enactments are procedurally fair and reasonably related to a proper legislative goal. (* 53.) Without question, the Commission operates pursuant to the state's police power. (*Id.*)

Second, when the Legislature meant to criminalize a violation of the Commission's authority, it declined to require a mental state for an act committed before the Commission. The Court drew this conclusion by the fact that the words "willfully" or "knowingly" were not included in Pub. Util. Code § 2107, meaning that the Legislature did not mean to impose a scienter requirement for a violation of "any part or any provision of any order, decision, decree, rule, direction, demand, or requirement of the commission." (* 54.)

The *PG&E* Court also made it clear that it would reach the same result if it examined Rule 1.1 without reference to Pub. Util. Code § 2107. It reasoned that Rule 1.1 "was promulgated by the Commission pursuant to its power under section 1701 to adopt 'rules of practice and procedure.' When the PUC intends to require that an act or omission be done with a specified mental state, it knows how to frame regulations expressing that intent." (* 54, footnote 19.) After reviewing other provisions applicable to the Commission where intent was specifically written into the regulation or statute, the *PG&E* Court found that "the Commission did not do so when it promulgated Rule 1.1. In that the same rules of construction govern both statutes and regulations promulgated by an administrative agency (citations omitted), we are no less precluded from reading such a requirement in Rule 1.1 as we are from inserting it into section 2107." (*Id.*)

#### 4.3.2. Reconciliation of Differing Prior Commission Decisions on Whether Rule 1.1 Requires Proof of Intent

*PG&E* acknowledged that reconciling past Commission decisions "is more problematic." (* 65.) Its "nonsystematic examination" of prior Commission decisions showed, in *PG&E's* view, that the Commission has issued seemingly contradictory decisions on the question of proof of intent. (See discussion at *66-74.) But that does not lead to the conclusion that the Commission's interpretation must be ignored. To the contrary, *PG&E* reaffirmed that a reviewing court must consider the meaning of Rule 1.1 in the context of its statutory ancestry, recognizing that statutes are part of an extensive regulatory scheme entrusted to the Commission's administration." (* 77.) And that responsibility "requires us to give some weight to the PUC's interpretation of those statutes, if that interpretation bears a reasonable relation to the statutes' language and purposes." (*Id.*) Since the subject addressed by Rule 1.1--ensuring the transmission of truthful information to the Commission—is central to the proper discharge of the Commission's responsibilities, any inconsistency in prior Commission decisions cannot be used "to vitiate a vital deterrent." (* 78.) Thus, *PG&E* rejected the argument that proof of intent is necessary to establish a Rule 1.1 violation.

Even putting the fact of differing Commission decisions aside, the *PG&E* decision said it would reach the same conclusion that proof of intent is not a prerequisite to proving a Rule 1.1 violation. This is because Rule 1.1 has to be placed in the larger statutory scheme from which it derives—namely Pub. Util. Code §§ 701, 1701, and 2107, none of which require proof of intent. In applying the rules of statutory construction, which apply equally to administrative regulations, one cannot read Rule 1.1 to require proof of intent when the statutes from which it arises carry no such requirement.

In view of PG&E's reading of Rule 1.1, we affirm our conclusion set forth, *supra*, in § 2.5 that the record establishes, by the preponderance of the evidence, that SFMTA violated Rule 1.1 when it disobeyed the subpoena *duces tecum*. Rather than repeat the arguments set forth above, we incorporate them by reference.

### 4.4. The Record Establishes that SFMTA was in Contempt for Violating the Subpoena *Duces Tecum*

SFMTA attempts to reargue that its objections to the subpoena *duces tecum* were not inexcusable, and that it had raised good faith defenses for noncompliance.[61] We have addressed these arguments, *supra*, in this decision and incorporate by reference our earlier analysis from §§ 2.3 and 2.4.

## 5. Waiver of Comments on Modified Presiding Officer's Decision

Pursuant to Rule 14.7(a)(4), no public review or comment is required on an appeal from the presiding officer's decision in an adjudicatory proceeding, that the Commission is authorized by law to consider in executive session.

## 6. Assignment of Proceeding

Michael Picker is the assigned Commissioner and Robert M. Mason III is the assigned ALJ in this proceeding and the Presiding Officer.

## Findings of Fact

1. On December 1, 2012, a fatal accident at the SFMTA's Mission Rock Station in the City and County of San Francisco occurred.

2. On March 14, 2013, a subpoena *duces tecum* was served on Edward D. Reiskin, Director, SFMTA, by e-mail and sent to Julia Friedlander, Counsel for

[61] SFMTA Appeal at 18-23.

the SFMTA. The subpoena *duces tecum* requested personnel records for the transit driver of the train that struck the deceased. The subpoena requested training records, accident history records, drug testing records, and train operation efficiency testing records.

3. The SFMTA failed to respond to the subpoena by the April 9, 2013 return date on the subpoena.

4. On April 11, 2013, Berdge wrote a letter to Julia Friedlander (via U.S. Mail and E-Mail) to confirm their conversation that Friedlander would accept service of process of the March 14, 2013 subpoena *duces tecum*. Friedlander's testimony confirms receipt of the April 11, 2013 letter.

5. Friedlander's letter dated April 19, 2013, also acknowledges receipt of the subpoena *duces tecum* that had been issued by the Commission's executive director, Paul Clanon, to Edward Reiskin, the SFMTA's Director of Transportation. Friedlander testified that she "redacted the requested compliance check records, training records and accident records only to obscure performance evaluation information they contained." As an alternative, Friedlander testified that she offered to make the "unredacted documents available for inspection at SFMTA offices, and I offered to provide unredacted copies to CPUC under an appropriate protective order or other non-disclosure agreement."

6. On April 30, 2013, Friedlander was copied on a letter from Berdge to Chief ALJ, Karen Clopton. The Re line of letter is "Motion to Hold San Francisco Municipal Transportation Agency in Contempt for Failure to Comply with a Subpoena *duces tecum* Issued March 14, 2013." The letter notes that the response deadline to the subpoena *duces tecum* was April 9, 2013, a date the SFMTA missed. Berdge goes on to assert that "Ms. Friedlander has explained to me that

the SFMTA will only provide certain documents demanded if Commission staff agrees to enter into a non-disclosure agreement concerning the use and release of those documents."

7. On May 10, 2013, Friedlander responded to Berdge's letter of April 30, 2013. While the letter states that the SFMTA has provided "extensive documentation to CPUC staff regarding the collision," the SFMTA only produced redacted copies of the records that were the subject of the subpoena *duces tecum*. She states that the SFMTA had produced redacted copies of the requested personnel records that dealt with performance evaluation information on the grounds that the SFMTA believed that information was protected from disclosure to the public by the employee's constitutional privacy rights.

8. On May 22, 2013, Frank Lindh wrote to Friedlander and the Re line was "Motion to Hold SFMTA in Contempt." Mr. Lindh offered that if "the SFMTA provides these records in compliance with the current SED subpoena, SED and the Legal Division will not post on its internet site or disclose in response to CPRA requests, in the absence of a Commission order or the consent of SFMTA."

9. On June 28, 2013, Friedlander responded to Lindh's May 22, 2013 letter. Friedlander renewed her suggestion that SED and the SFMTA discuss the terms of a non-disclosure agreement "that might better facilitate the flow of information in future CPUC investigations of SFMTA incidents."

10. On July 18, 2013, Berdge wrote to Friedlander and requested that the SFMTA produce the train operator's compliance checks for the last three years; efficiency tests for the last three years; and all accident reports.

11. The SFMTA failed to respond within the 30-day period set forth in the July 18, 2013 letter.

12. On September 25, 2013, the Commission issued the instant OII.

13. A PHC was held on December 18, 2013.

14. The Scoping Memo and Ruling was issued on January 30, 2014, and identified five issues for resolution.

15. The assigned ALJ issued his ruling on Legal Issues One, Two, and Three on May 6, 2014.

16. On June 4, 2014, the SFMTA produced the unredacted copies of the transit driver's training and accident records.

17. The evidentiary hearing was held on June 26, 2014.

18. On August 11, 2014, SED filed a motion to reopen the record to permit the introduction of drug and alcohol records of the train operator involved in the December 1, 2012 incident.

19. On August 20, 2014, the ALJ issued an e-mail ruling granting SED's motion.

20. An order extending the statutory deadline was issued on September 17, 2014, that extended the statutory deadline to March 13, 2015.

## Conclusions of Law

1. The RTSS safety jurisdiction to investigate Rail Fixed Guideway Systems and Light Rail Transit accidents permits it to obtain full and unredacted copies of the SFMTA's training and accident records of the transit driver of the Muni Light Rail Train involved in the December 1, 2012 incident.

2. The SFMTA was required to produce the documents requested in the subpoena *duces tecum* that was issued on March 14, 2013, pursuant to Pub. Util. Code §§ 309.7, 311(a), 315, 99152, and Civil Code § 1798.24(e).

3. Neither Pub. Util. Code § 309.7 nor GO 164-D, § 8.3(b) give SFMTA the authority to alter the compliance terms of the subpoena *duces tecum*.

4. The transit driver's training and accident records are public records.

5. The SFMTA was not justified in refusing to produce unredacted copies of the transit driver's training and accident records to the Commission's SED and Enforcement Division/RTSS.

6. The transit driver's training and accident records do not enjoy a specific legally protected privacy interest.

7. The transit driver did not have an objectively reasonable expectation of privacy as to his training and accident records.

8. The production of the transit driver's unredacted training and accident records would not constitute a serious invasion of a privacy interest.

9. The evidence establishes, beyond a reasonable doubt, that the SFMTA is in contempt for disobeying the March 14, 2013 subpoena *duces tecum*.

10. The SFMTA was in contempt from April 9, 2013 to June 4, 2014.

11. The SFMTA violated Rule 1.1 by disobeying the subpoena *duces tecum* from April 9, 2013, to June 4, 2014.

12. The SFMTA violated Pub. Util. Code § 2107 by disobeying the subpoena *duces tecum* from April 9, 2013 to June 4, 2014.

13. The SFMTA should be fined $1,000.00 for contempt.

14. The SFMTA should be fined $210,500 for violating Rule 1.1 from April 9, 2013, to June 4, 2014.

## O R D E R

**IT IS ORDERED** that:

1. The San Francisco Metropolitan Transportation Agency (SFMTA) must pay a $1,000.00 contempt fine, and a $210,500 fine, by check or money order payable to the California Public Utilities Commission (Commission) and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue,

Room 3000, San Francisco, CA 94102, within 40 days of the effective date of this order. The SFMTA shall write on the face of the check or money order "For deposit to the General Fund pursuant to Decision _____.

2. All money received by the California Public Utilities Commission's Fiscal Office pursuant to Ordering Paragraph No. 1 shall be deposited or transferred to the State of California General Fund.

3. Investigation 13-09-012 is closed.

This order is effective today.

Dated _____, at San Francisco, California.